SERVED: November 12, 1999

NTSB Order No. EM-185

UNITED STATES OF AMERICA
**NATIONAL TRANSPORTATION SAFETY BOARD**
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 2nd day of November, 1999

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| JAMES M. LOY,<br>Commandant,<br>United States Coast Guard, | ) | |
| v. | ) | Docket ME-166 |
| JOSEPH CATTON,<br>Appellant. | ) | |

**OPINION AND ORDER**

Appellant, by counsel, seeks review of a decision of the Commandant (Appeal No. 2598, dated March 23, 1998) affirming a decision and order entered by Coast Guard Administrative Law Judge Rosemary A. Denson on June 10, 1996, following an evidentiary hearing that concluded on June 8, 1995.[1] The law judge sustained a charge that appellant had used a dangerous drug

[1]Copies of the decisions of the Commandant and the law judge are attached.

(namely, marijuana) and ordered that appellant's Merchant Mariner's License (No. 88237) be revoked. As we find that appellant has not established reversible error in the Commandant's affirmance of the law judge's decision, we will deny the appeal, to which the Coast Guard has filed a reply in opposition.

We have carefully reviewed appellant's contentions to the effect that the Commandant erred in concluding that, notwithstanding some noncompliance with the literal requirements of applicable drug and alcohol testing regulations on proper specimen collection and handling procedures, there were no departures that undermined the integrity of the sample or the adequacy of its chain-of-custody.[2] We agree, for the reasons articulated in the Commandant's decision, that he correctly determined that no variance from the drug-testing regulations requiring a reversal of the law judge's decision had been identified, and that, therefore, the marijuana-positive results of the testing were sufficient to establish the presumption, not rebutted by appellant, that he had used a dangerous drug.

We are also satisfied that the Commandant correctly rejected appellant's claim that the lab records (Investigating Officer ("I.O.") Exhibits 1-A and 1-B) reflecting the positive drug test results should not have been admitted for want of proper

[2]We have previously rejected the contention that de minimis or irrelevant deviations from the requirements of drug-testing regulations must be treated as fatal to the use in evidence in a Coast Guard proceeding of the results of a test. See Commandant v. Sweeney, NTSB Order No. EM-176 (1994), at 5.

authentication.[3] Appellant has not demonstrated by reference to case law any requirement that such records must be sponsored by the individual who actually performed the tests, and, like the Coast Guard, we think the provision of the Federal Rules of Evidence (FRE) that he cites in support of his position actually compels a conclusion that the documents were properly admitted.[4]

Specifically, appellant has not established why Ms. Carol Trojan, a certified scientist co-worker of the certified scientist who performed the drug tests on his specimen, should not be deemed, within the meaning of FRE Rule 803(6), to be a witness qualified to introduce the lab tests as records she knew were of the kind made and kept in the normal course of a regularly conducted business activity of their employer, SmithKline Beacham Clinical Laboratories.[5] Ms. Trojan was knowledgeable about the tests the laboratory performed, the meaning of the results obtained, and the procedures applicable to

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[3]Appellant has alleged no fact or facts which would draw the trustworthiness of the information contained in I.O. Exhibit 1-A or 1-B in issue.

[4]The Federal Rules of Evidence are not controlling in these proceedings, but they do serve as "primary guidance for evidentiary matters..." in them. See 46 C.F.R. § 5.537.

[5]FRE 803 enumerates various exceptions to the rule against admission of hearsay evidence. Appellant's contention that Ms. Trojan could not authenticate the records because she lacked personal knowledge of the reliability of the information on which they were based is in effect no more than an objection to the records on the ground that they are hearsay. The issue, of course, is not whether they are hearsay but whether a exception exists to support their admission. Appellant has thus not explained his position that the business records exception does not justify admission of the lab reports.

the handling of specimen samples subject to the Department of Transportation's ("DOT") drug testing regulations and Drug Testing Custody and Control Form ("DTCCF") paperwork. There is nothing is the record to contradict Ms. Trojan's assurances that a sample would be rejected if any problem concerning chain-of-custody was discovered and that laboratory documentation showed that no chain-of-custody irregularities had occurred in connection with appellant's sample.[6] In these circumstances, we cannot conclude that the admission of the lab reports was inappropriate.

Lastly, we find unavailing Appellant's contention that Ms. Trojan's testimony, taken by telephone, should be disregarded for procedural and substantive reasons. Appellant first argues that because the Coast Guard regulation (46 C.F.R. § 5.535(f)) authorizing testimony by telephone states that an administrative law judge may approve a such request "when testimony would otherwise be taken by deposition," the Coast Guard was thereby obligated to follow its regulation for seeking testimony by deposition (46 C.F.R. § 5.553(a)), including the requirement, not followed in this instance, of filing a written request. We perceive no basis for not deferring to the Coast Guard's

[6]Since evidence of any attempt to open the package containing the sample or defeat its tamper-proof seals would have been apparent to those receiving it at the testing laboratory, we disagree with appellant's position that the Coast Guard was obligated to produce evidence concerning anyone who actually handled it at the facility (Doctor Urgent Care) to which it was delivered by the collection officer for subsequent pickup by SmithKline.

interpretation that the language cited by the appellant was intended only to identify the circumstances in which testimony by telephone would be appropriate, not as a direction to use the same procedures for requesting authority to take testimony either by telephone or by deposition.

As to appellant's substantive point, we decline to rule on his argument that the telephone testimony should be stricken because the process which produced it adversely affected his ability to cross examine a witness against him. Such an argument is essentially an attack on the validity of the Coast Guard's regulation on a matter of practice and procedure.[7] The Board is not the proper forum for the review of such challenges.[8]

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The appellant's appeal is denied; and

2. The Commandant's decision affirming the decision and order of the law judge is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

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[7]At the same time, we have no hesitancy in stating that we perceive no unfairness to appellant in the application of the regulation in the circumstances presented. Ms. Trojan, who was neither a fact nor percipient witness, testified mostly about her employer's testing and record-keeping practices and procedures. She did not possess the kind of personal knowledge about the actual collecting or testing of appellant's urine specimen as might otherwise have suggested the need to closely scrutinize her credibility by observing her demeanor while testifying.

[8]See, e.g., Administrator v. Lloyd, 1 NTSB 1826, 1828 (1972), wherein we held that the Board lacks authority to rule on the constitutional validity of regulations promulgated by the Administrator of the Federal Aviation Administration. The FAA, like the Coast Guard, is an agency within the DOT.